YA BIN DAUD

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KOTA BHARU
DATO' NIK HASHIM BIN NIK AB. RAHMAN JC
[CRIMINAL APPEAL NO: 42-30-94]
31 JANUARY 1996

CRIMINAL LAW: *Penal Code - Section 304 First Limb - Culpable homicide - Private defence - Section 96 of the Penal Code - Whether accused under the reasonable apprehension of death or grievous hurt - Whether injuries inflicted commensurate with the situation.*

EVIDENCE: *Evidence Act 1950, s. 105 - Onus of proof when private defence is invoked - Whether onus a heavy one.*

The appellant was convicted of culpable homicide not amounting to murder under s. 304 first limb of the Penal Code and sentenced to 7 years imprisonment by the Sessions Court. The appellant appealed against his conviction and sentence. At the material time, in furtherance of a fight between the appellant and the deceased's brother (SP5), the deceased, his sister, Kelthum (SP8) and nephew Mat Akib (SP10) confronted the appellant at the compound of the latter's house to seek revenge over the serious bodily injuries inflicted by him on SP5.

Both the deceased and SP10 were armed with a long sword and a sharp pointed kelewang respectively. The appellant's wife (SP15) testified that the two chased the appellant with the weapons raised in their hands and the appellant was facing the deceased on his left and SP10 on his right. Upon seeing the attackers the appellant, who was slashed on the cheek and back, rushed to his house and got hold of a golok and defended himself and in the process of defending he seriously injured SP10 and fatally stabbed the deceased. The primary issue before the Court was whether the appellant was acting under a reasonable apprehension that death or grievous hurt would be caused to him by the assailants and as such entitled to the right of private defence.

Held:

[1] The appellant had more than a reasonable apprehension of death and grievous hurt at the hands of the deceased and SP10. He does not have to wait till he receives a grievous injury before he can exercise his right of private defence. There was no way out for the appellant to escape as he was surrounded by SP10, the deceased and SP8. He was entitled to defend himself the best way he could.

[2] The benefit of right of private defence equally applies to the appellant, regardless of whether he was a silat instructor and was young or even stronger than the deceased or SP10.

[3] The appellant had acted proportionately within his right and was not in excess of that right when he inflicted the fatal blow.

[Appellant acquitted and discharged]

Cases referred to:
Public Prosecutor v. Ngoi Ming Sean [1982] 1 MLJ 24 ***(foll)***
Musa bin yusof v. Public Prosecutor [1953] MLJ 70 ***(foll)***
Govindan Neelambaran v. State of Kerala AIR 1960 Ker. 258 ***(foll)***
Jai Dev v. State of Punjab AIR 1963, SC 612 ***(foll)***
Raman v. Public Prosecutor [1948-49] MLJ Supp. 146 ***(foll)***

Legislation referred to:
Evidence Act, s. 105
First Limb of the Penal Code, s. 304

Other sources referred to:
Ratanlal: The Law Of Crime 22nd Edn., p. 220

For the appellant - Mohd. Apandi bin Ali
For the respondent - Mohd. Dusuki bin Hj. Mokhtar, DPP

JUDGMENT

Nik Hashim Nik Ab. Rahman JC:

The appellant was convicted by the Sessions Court at Kota Bharu on a charge of culpable homicide not amounting to murder of one Yusof bin Deris on 18 December 1993 at about 7.00 pm at Kampung Sedar, Tumpat, an offence punishable under s. 304 First Limb of the Penal Code. The appellant was sentenced to 7 years imprisonment. The sentence however, was stayed pending appeal. He appealed against both the conviction and sentence.

The prosecution evidence in the Court below disclosed that at about 6.00 to 6.30 pm on 18 December 1993 the appellant and the deceased's brother, Yaacob bin Deris (SP5) were fighting at sawah not far from the accused's house. The fight was over SP5's cattles which the appellant alleged to have strayed and destroyed his crops. In the course of the fight, SP5 was seriously injured on his stomach with liver protuding out. SP5's family and relatives came to know about the incident. On his way home, the appellant was confronted by the deceased and Mat Akib (SP10). The deceased was the younger brother of SP5, and SP10 was their nephew. The deceased was armed with a sword (P7) whilst SP10 with a kelewang (P10). On seeing this, the appellant rushed home. He asked for his golok (P6) from his wife (SP15) which she gave him. According to her, the appellant was facing the deceased on his left and SP10

on his right. Together they attacked the appellant. The appellant was armed with P6. SP10 slashed the appellant with the kelewang (P10) on his left cheek and bled. On seeing blood, SP15 cried for help. But nobody came to her rescue. Meanwhile, SP10 and the deceased continued attacking the appellant. The appellant fought back. The fighting took place in the compound of the appellant's house. In the event, the deceased was fatally wounded on his head and died at the scene. SP10 was seriously injured, while the appellant was wounded on his left face and right knee.

In the meantime, the police arrived and the appellant surrendered.

The learned Counsel for the appellant Encik Mohd. Apandi Ali submitted that because of the presence of group 'A' blood on kelewang (P10) used by SP10 in the fight, and the blood was identical with the deceased's group 'A' blood, the appellant who was armed with P6, which had insufficient blood for blood grouping, could not have caused the death of the deceased.

On this issue, the learned Sessions Court Judge has made a finding of fact that the appellant had caused the deceased's death with P6.

In her evidence Kelthum (SP8) sister of the deceased said this:

> Saya nampak Ya lewa dan takil Jusoh

Whilst Mat Akib (SP10) said in his evidence:

> Saya nampak Jusoh kena pedang Ya.

Abdul Rahman bin Daud (SP11) the brother of the appellant, said that the appellant used P6 in the fight. Investigation revealed that there was a lot of blood at the scene. According to the investigation officer ASP Mustapha Khan (SP16), he said there was a likelihood that P10 was stained with blood at the place. In my view, this is reasonable. SP10, who was armed with P10, said that he was trying to help the deceased who was then about to fall and bleeding. Hence the blood on P10. Apart from the fact that there was blood on P6 but insufficient for blood grouping, there was also in evidence that the appellant stabbed the group with P6 soon after the assault on SP10. This could, I think, explain the cause of the loss and disappearance of some of the blood on P6. That being so, I with respect, agree with the finding of the learned Sessions Court Judge that it was the appellant who caused the death of the deceased with P6.

The learned Counsel for the appellant further submitted that the right of private defence is applicable in this case which makes the killing no offence under the Penal Code.

Ajaib Singh J in *Public Prosecutor v. Ngoi Ming Sean* [1982] 1 MLJ 24 explained the provisions of the right of private defence at page 25 (H):

> The Penal Code provides that nothing is an offence which is done in the exercise of the right of private defence of a person's body. But there is no such right where the person has time to seek the protection of the public authorities. Nor will this right of private defence extend to the inflicting of more harm than is necessary for the purpose of defence. Subject to these limitations the right of private defence of the body extends even to the voluntary causing of death or any other harm to the assailant if the person who exercises his right of private defence is under a reasonable apprehension that death or grievous hurt would be caused to him by the assailant. The right of private defence commences as soon as there is reasonable apprehension of danger to the body and this right continues so long as such apprehension of danger continues. (See s. 96 to 102 of the Penal Code). And it goes without saying that the right of private defence ceases and is not available when there is no more apprehension of danger to the body

In the case of *Musa bin Yusof v. Public Prosecutor* [1953] MLJ 70 the Court of Appeal held that:

> The law in this country gives greater latitude to a person who is attacked than does the law in England. The question in such cases is not whether there was an actual continuing danger, but whether there was a reasonable apprehension of danger. If such a condition exists, the person attacked is not obliged to retreat, but may pursue his adversary till he finds himself out of danger; if in a conflict between them, he happens to kill, such killing is justifiable.

Whilst in the case of *Govindan Neelambaran v. State of Kerala* AIR 1960 Ker. 258 the following passage appears in the judgment of the Court of Appeal:

> It is not necessary nor does the law require that the accused should wait till he receives a grievous injury for the purpose of exercising his right of private defence. In considering whether the accused is entitled to exercise the right of private defence, one has to place himself in the position of the accused in the midst of circumstances in which the accused stood and then form an opinion whether under the peculiar circumstances the accused had not the apprehension of such injuries to his body as would entitle him to exercise his right.

The Supreme Court of India made the following observations in the case of *Jai Dev v. State of Punjab* AIR 1963, SC 612:

> The law of private defence does not require that the person assaulted or facing an apprehension of an assault must run away for safety.

The right of private defence is one of the General Exceptions set out in Chapter IV of the Penal Code, proof of which by virtue of s. 105 of the Evidence Act, rests on the accused, and the burden is not a heavy one. Spenser Wilkinson J in *Raman v. Public Prosecutor* [1948-49] MLJ Supp. 146, said:

> In criminal matters, whilst it is true that s. 105 of the Evidence Enactment casts the burden upon an accused person of proving the existence of circumstances bringing the case within any special exception contained in the Code, it has

a always been held, not only that this burden is not a heavy one but also that the accused is entitled, if he can, to bring himself within the exceptions by reference to facts proved by the prosecution evidence.

Having considered the provisions in the Penal Code on the right of private defence, and its principles in the cases aforesaid, the Court has to decide b whether the appellant was acting under a reasonable apprehension that death or grievous hurt would be caused to him by the assailants. Whether the apprehension was reasonable or not is a question of fact. The weapon used, the manner of using it, the nature of assault and other surrounding circumstances are to be taken into account (*Ratanlal: The Law of Crime* c 22nd Edition page 220).

This case involved two families. It is not unnatural that each party was dissociating from the offence and blaming the other for the fight. In such a situation, it is incumbent on the trial Court to scrutinise their evidence with care. In this case, it seems to me that the learned trial Judge dealt mainly d with the evidence of SP5, SP8 and SP10 in his judgment without giving sufficient consideration to the evidence of SP11, SP13, SP14, SP15 and the appellant. To my mind, their evidence are equally important and relevant too, and unless for reasons to be recorded, their evidence are not to be disregarded.

e The learned Deputy Public Prosecutor Encik Mohd. Dusuki bin Hj. Mokhtar in urging the Court to dismiss the appeal submitted that the appellant was to be blamed for the fight as he had earlier injured SP5. Further, he was an expert in silat and was the youngest and hence stronger than his assailants and as such the circumstances did not warrant him to exercise his right of f private defence.

On the day in question, the appellant was 40 years old, married with children, a farmer by occupation and a silat instructor. The deceased was 49 years old while SP10 was 44. They lived in the same kampong. The deceased's house was about 237 meters away from the appellant's.

g According to the evidence the attack took place in the compound of the appellant's house. This fact was not in dispute.

The learned Counsel for the appellant submitted that SP10 and the deceased were tresspassers and they were the ones who attacked the appellant first. h The evidence showed that SP5 was injured in the fight earlier with the appellant. This triggered the subsequent fight between the deceased and SP10 on one side and the appellant on the other. What the deceased or SP10 should have done was to report SP5's injuries to the police. But they did not. They chose to attack the appellant. Perhaps, in their minds that was the best and i the right course of action to be taken against the appellant at that time. They came uninvited and armed, SP10 with a sharp pointed kelewang (P10), while the deceased with a long sword (P7). According to appellant's wife (SP15),

they chased the appellant with the weapons raised in their hands. The appellant said the deceased also uttered the word "sabil" three times and called the appellant "Firaun". The appellant rushed to his house and got a golok (P6) from his wife. According to SP14, the appellant was cornered with the deceased on his left, SP10 on his right while SP8 behind him. SP11 and SP15 also said that the appellant was caught in between the deceased and SP10. In his evidence the appellant said under cross-examination at page 195 of record paragraphs 40 to 46:

> 40. Mula-mula Mat Akib serang saya, kemudian Kelthum serang saya. Kemudian Yusof sampai. Mereka bergabung dan mengepong saya.
>
> 41. Bila saya berpaling lari, Kelthum tolak saya pergi ke depan.
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> 42. Saya pergi ke depan, Yusof terus tetak saya di belakang beberapa kali.
>
> 43. Kelthum naik atas belakang saya dan saya pergi ke depan ke tempat Mat Akib dan Yusof.
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> 44. Walaupun tubuh saya besar, Kelthum tolak saya, saya tersungkur ke depan.
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> 45. Yusof tetak saya beberapa kali. Saya sanggah dengan golok serangan Yusof. Mat Akib tetak saya, saya berundur dan kelewang Mat Akib ke arah Yusof.
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> 46. Kelewang Mat Akib tak berlaga dengan saya.

SP15 cried and shouted for help on seing SP10 slashing her husband appellant on his cheek. The deceased's swords (P7) was longer than the appellant's golok (P6) but P6 was somewhat of the same length with SP10's kelewang (P10).

There are five blade cuts on P7 and P6. These show that the weapons were used by the deceased and the appellant to strike and defend against one another. According to the appellant he used P6 to defend the blows of the deceased. I find the appellant's evidence consistent with the fact that he was attacked by the deceased. SP15 at page 139 paragraphs 90 and 91 said: "Yusof dan Mat Akib berlawan dengan Ya". "Mereka menggunakan senjata." SP14 in his evidence at page 124 paragraph 13 said: "Jusoh sedang bertakil dengan Ya pada masa itu". Together they attacked the appellant, and the appellant being alone and cornered in his own compound and coupled with the crying of his wife, I find that at that point of time, the appellant had more than a reasonable apprehension of death or grievous hurt at the hands of the deceased and SP10. He needs not wait till he receives a grievous injury before he can exercise his right of private defence. There was no way out for the appellant to escape as he was surrounded by SP10, the deceased and SP8. He was entitled to defend himself the best way he could. The benefit of right of private defence equally applies to him, regardless of whether he was a silat instructor and was younger or even stronger than the deceased or SP10. The attack by

the deceased and SP10 had indeed created a dangerous situation on his life that he had no time to reflect but to strike back. His only concern then was, "matilah aku" (paragraph 118 page 190 of record). Unfortunately his act caused the death of the deceased and seriously injured SP10. The Court is sympathetic with the deceased, SP10, SP5 and their families. However, the Court decides the case solely on the evidence before it, and indeed it is its duty to see that justice is done in this case. The appellant had acted within his right in order to defend himself and was not in excess of that right. He ceased his right immediately after he was out of danger. He surrendered himself to the police. By virtue of s. 96 of the Penal Code, I find the appellant Ya bin Daud not guilty and I allow the appeal. The conviction and sentence are to be set aside. I hereby order that the appellant be acquitted and discharged.

Reported by Akbardin Hj. Abdul Kadir